11-1300-16459-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Appeal of the Minnesota Department of Education's Demand for Reimbursement of Child and Adult Food Care Program Overpayments.

ORDER ON CROSS MOTIONS FOR SUMMARY DISPOSITION

The above-entitled matter came before Administrative Law Judge Barbara L. Neilson on the parties' cross motions for summary disposition. The Department filed its motion on August 22, 2005. The Respondent filed its response in opposition to the Department's motion and its cross motion on September 23, 2005. The Department filed its reply brief on October 11, 2005. Oral argument on the motions was heard on October 25, 2005, at the Office of Administrative Hearings.

Beverly A. Bryant, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2130, represented the Minnesota Department of Education ("MDE" or "the Department"). Kevin P. Staunton, Attorney at Law, Staunton Law Group, PLLC, 5277 Lochloy Drive, Edina, Minnesota 55436, appeared on behalf of the Minnesota Licensed Family Child Care Association ("the Respondent").

Based upon the file, record, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

1. The parties' cross motions for summary disposition are denied. This matter shall proceed to hearing.

2. A telephone conference call will be held on **Wednesday, December 28, 2005, at 2:30 p.m.** to set a hearing date in this matter. The Administrative Law Judge will initiate the call.

Dated: December 15, 2005.

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Background regarding the Federal Child and Adult Care Food Program

Under the federal Child and Adult Care Food Program ("the Program"),[1] federal funds are provided for nutritious meals and snacks served to adults and children receiving care at family child care homes, child care centers, and other locations. The United States Department of Agriculture ("USDA") has promulgated regulations with respect to the Program, which are set forth in 7 C.F.R. Part 226. The USDA Food and Nutrition Service ("FNS") administers the Program through grants issued to the states[2] which are typically administered by the state educational agency. These state agencies enter into a written agreement with the USDA "for the administration of the Program in the state in accordance with the provisions of [7 C.F.R. Part 226]."[3] The state agencies thereafter enter into agreements with sponsoring organizations to administer Program operations for day care providers,[4] and the sponsoring organizations enter into contracts with day care providers to provide meals to enrolled children.[5]

The regulations promulgated under the Act define "sponsoring organization" to mean "a public or nonprofit private organization which is entirely responsible for the administration of the food program in . . . [o]ne or more day care homes . . . ."[6] The federal law specifies that, to be eligible to participate in the Program, an "institution"[7] (defined to include sponsoring organizations) must satisfy certain criteria, including "accept[ing] final administrative and financial responsibility for management of an effective food service"; "provid[ing] adequate supervisory and operational personnel for overall monitoring and management of the child care food program"; and (with respect to sponsoring organizations), "employ[ing] an appropriate number of monitoring personnel . . . as approved by the State."[8] As part of the application process, renewing sponsoring organizations must demonstrate that "appropriate and effective management practices [are] in effect to ensure that the Program operates in accordance with [7 C.F.R. Part 226];" they have "an adequate number and type of qualified staff to ensure the operation of the Program in accordance with [7 C.F.R. Part 226];" they employ "staff sufficient to meet the ratio of monitors to facilities;" and they meet numerous other requirements.[9] Renewing sponsoring organizations are also required to document in their management plans that they will "[p]erform monitoring in accordance with § 226.16(d)(4), to ensure that sponsored facilities accountably and

1 *See* 42 U.S.C. § 1766.

2 42 U.S.C. § 1766(a); 7 C.F.R. § 226.1.

3 42 U.S.C. §1766(f)(1)(A); 7 C.F.R. § 226.3.

4 7 C.F.R. § 226.6(b).

5 7 C.F.R. §226.18(b).

6 7 C.F.R. § 226.2.

7 The term "institution" is defined in the federal law to include "any public or private nonprofit organization acting as a sponsoring organization for one or more family or group day care homes." 42 U.S.C. § 1766(a)(2)(E). The term "institution" is defined in the regulations to include "a sponsoring organization, child care center, outside-school-hours care center, emergency shelter or adult day care center which enters into an agreement with the State agency to assume final administrative and financial responsibility for Program operations." 7 C.F.R. § 226.2.

8 42 U.S.C. §1766(a)(6).

9 7 C.F.R. § 226.6(b)(2)(vii)((B). With respect to the monitoring of day care homes, section 226.16(b)(1) requires that sponsoring organizations must employ the equivalent of one full-time staff person for each 50 to 150 day care homes they sponsor.

appropriately operate the Program."[10] Applicants must submit a detailed management plan that describes the procedures they will follow in administering the Program and identifies staff assigned to manage and monitor the Program.[11] The rules governing the Program make it clear that "[e]ach sponsoring organization shall accept final administrative and financial responsibility for food service operations in all child care and adult day care facilities under its jurisdiction."[12]

The disbursements made by the states under the Program "shall be made only for the purpose of assisting in providing meals to children attending institutions, or in family or group day care homes."[13] The rules specify that reimbursement is provided "for meals served to children enrolled in approved day care homes."[14] The sponsoring organization submits monthly claims to the state agency for the number of meals served by the day care provider. The amount of reimbursement provided is based on the number of meals served to enrolled children multiplied by the appropriate reimbursement rate for each type of meal the provider is approved to serve. The state agency pays the reimbursable amounts to the sponsoring organization, and the sponsoring organization then distributes the payment to the day care provider.[15] The state agency is provided funding by the USDA for the purpose of conducting audits of participating institutions.[16] The state agency is responsible for ongoing oversight of sponsoring organizations, including regular reviews to ensure compliance with Program regulations.[17]

The federal law states that "[t]he State **may** recover funds disbursed [to eligible institutions] if the State determines that the institution has engaged in fraud or abuse with respect to the program or has submitted an invalid claim for reimbursement."[18] However, the rules promulgated by the USDA specify that "[s]tate agencies **shall** disallow any portion of a claim for reimbursement and recover any payment to an institution not properly payable under this part [7 C.F.R. Part 226]."[19] A Notice issued by the FNS on May 25, 2004,[20] states that, while unearned funds paid to a provider by a sponsoring organization must be recovered by the State agency from the sponsor "in most instances," in exceptional cases the State agency may decided to forego collection from the sponsoring organization "to the extent that the sponsor is able to demonstrate that it (1) was not responsible for the overpayment and (2) had made every reasonable effort to recover the funds."[21]

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10 7 C.F.R. § 226(b)(2)(vii)(C)(4)(ii).

11 7 C.F.R. § 226.6(b) and (c); *see also* Mork Affidavit, ¶ 3 and Ex. A;

12 7 C.F.R. § 226.16(c).

13 42 U.S.C. § 1766(f)(1)(A).

14 7 C.F.R.§ 226.13(a) and (c).

15 7 C.F.R. § 226.13(c).

16 42 U.S.C. § 1766(i).

17 *See* 7 C.F.R. §§ 226.6 and 226.8.

18 42 U.S.C. § 1766(f)(1)(B) (emphasis added).

19 7 C.F.R. §226.14(a) (emphasis added).

20 *See* Ex. C to Bryant Affidavit.

21 *See* Ex. C to Bryant Affidavit.

In Minnesota, the Program is administered by the Minnesota Department of Education by virtue of a federal-state agreement with the USDA.[22] Under the agreement, the MDE acknowledged that it would be "responsible for the operation of" the Child and Adult Care Food Program for nonresidential child care institutions and nonresidential adult care institutions. The Department agreed "to accept Federal funds for expenditure . . . in accordance with the applicable regulations and any amendments thereto, and to comply with all the provisions thereof, and with any instructions or procedures issued in connection therewith." The agreement indicated that copies of the applicable current regulations were attached and made a part of the agreement.[23]

Underlying Facts

Based upon the submissions of the parties in connection with the cross motions for summary disposition, it appears that the underlying facts in this case are as follows. The Respondent, the Minnesota Licensed Family Child Care Association, is an organization comprised of family child care providers, other provider associations, and support groups. The Respondent has entered into Sponsoring Authority agreements with the MDE to administer the Program for family day care providers since 1978.[24] The Respondent has repeatedly applied for and received approval from the state to be a sponsoring organization. It has never had an application denied.[25] The Respondent agreed as part of its Sponsoring Authority agreement with the Department to "comply with the program statutes and program regulations applicable to the programs covered by this agreement." The Respondent also agreed that it would "comply with any MN Department of Children, Families & Learning[26] policy memorandums and other written directives interpreting the program statutes and regulations."[27]

The Respondent entered into sponsorship agreements with day care providers Ker Vang, Blia Xiong, Zhia Vang, and Lee Vang to reimburse them for meals served to eligible children enrolled in their day care homes. Zhia Vang also worked as a Program monitor under contract with Respondent. Monitors are to visit the homes of day care providers on a periodic basis to verify the number of children enrolled and the type of meals being served. During fiscal years 1999-2000, 2000-2001, and 2001-2002, the Respondent submitted reimbursement claims for each of the above four individuals totaling $54,994.77, $24,316.12, $85,455.45, and $125,095.50.[28]

In 2004, the Respondent discovered that these day care providers stole over $200,000 of Program funds by presenting requests for meals and snacks that had never actually been served to children. The above four members of the group were convicted of defrauding the Program. Between June 30, 2004, and November 9, 2004, the Respondent sent each of these individuals a Notice of Serious Deficiency based upon their conviction for child care fraud and submission of false claims under 7 C.F.R.

22 *See* Ex. A to Affidavit of Beverly Bryant.

23 *Id.*

24 Mork Affidavit, ¶ 3; *see* Ex. B to Affidavit of Beverly Bryant.

25 Mork Affidavit, ¶ 3.

26 The Minnesota Department of Children, Families and Learning was renamed the Minnesota Department of Education in 2003.

27 Bryant Affidavit, Ex. B, clause 9A and Appendix A.

28 Bryant Affidavit, Ex. C. The Respondent did not dispute the facts set forth by the MDE in its Memorandum, with the exception of the precise amount of the overpayments due.

§ 226.16(l)(2)(ii) for children who were not enrolled in day care or who did not exist. The Respondent determined that each of these individuals was required to pay back to the Program the amounts of $44,233.42, $24,316.12, $58,516.41, and $107,271.34, respectively. The Respondent also terminated their agreements to participate in the Program and disqualified them from future participation in the Program.[29]

In the spring of 2002, two months before the Hennepin County Fraud Investigative Unit executed its initial search warrant that led ultimately to convictions of the providers, MDE performed a regular review of Respondent's operation. The MDE's review included drop-in visits of a sample of the Respondent's providers. The Respondent had noticed that a large portion of their Hmong providers were submitting "block" claims for reimbursement (i.e., claims that included the maximum number of meals within each time period), and communicated their concerns to the MDE's Program Reviewer. The Reviewer subsequently selected 11 Hmong providers to be included in her drop-in visits, but did not discover any problems with these providers.[30]

The provider fraud was uncovered by Hennepin County in connection with an investigation of suspected welfare fraud by Lee Vang. Eventually, a Hennepin County investigator executed a search warrant to obtain documents from the Respondent. Unlike other sponsoring organizations contacted by the County, the Respondent cooperated with the investigation and assisted Hennepin County in establishing that the providers had defrauded the Program.[31] The investigation ultimately led to the conviction via plea bargain of Ker Vang, Blia Xiong, Zhia Vang, and Lee Vang for defrauding the Program.[32] Restitution was required from each of these individuals in the respective amounts of $44,233.42, $24,316.12, $58,516.41, and $107,271.34. The Respondent believes that the prosecutors calculated the amount of restitution that would be required in each case by totaling the reimbursements for only the number of children over the number the providers' day care license allowed them to have.[33]

After the MDE learned of the convictions, it required the Respondent to verify the existence of all of the children identified by each of the providers as having been served meals and snacks during the relevant time period. The Respondent submitted an affidavit indicating that it sought to verify the existence of the children who had been listed by the providers by sending letters to last known addresses reflected on enrollment forms that were 3 to 6 years old, checking the listed addresses to confirm that residences existed at those addresses, and attempting to contact parents at their last known phone numbers. The Respondent contends that the verification process was complicated by language and cultural issues and the fact that three to six years had passed. Ultimately, the MDE required the Respondent to include in the overpayment amount all costs related to children who could not be independently verified, resulting in an overpayment calculation higher than the total restitution required by the plea agreements.[34]

29 Department's brief at 4-5; Mork Affidavit, ¶ 5.

30 Mork Affidavit, ¶ 7

31 Affidavit of Steve Halicki, ¶¶ 2, 4, 6.

32 Mork Affidavit, ¶ 10; Halicki Affidavit, ¶ 1.

33 Mork Affidavit, ¶ 10.

34 Mork Affidavit, ¶ 10.

On November 30, 2004, the Department disallowed the claims for meals for non-existent or non-enrolled children and issued a demand to the Respondent to repay overpayments made to the following individuals in the following amounts:

Ker Vang	$45,053.67
Blia Xiong	$24,316.12
Zhia Vang	$77,411.37
Lee Vang	$118,163.22[35]

Since the notice of appeal was served, Blia Xiong has repaid the total amount of overpayments made to her.[36] The Department agrees that that amount is no longer involved in this appeal.[37]

On December 15, 2004, the Respondent appealed the overpayment demand with respect to the individuals identified above.[38] In its appeal letter, the Respondent asserted that it was not responsible for the overpayments that were made, and alleged that Ms. Zhia Vang devised and executed a "massive and sophisticated fraud scheme" which resulted in the overpayment. The Respondent argued that Ms. Vang's scheme "took advantage of significant cultural and language barriers associated with providing food program assistance to the Hmong community." It contended that it adopted and followed policies and procedures to monitor providers, and expressed concerns to the Department during an MDE review regarding the high reimbursement levels coming from Hmong providers it sponsored. The Respondent pointed out that neither its own monitoring nor the MDE's audits of the fraudulent providers, including drop-in visits, uncovered the fraud. The Respondent emphasized that it did not benefit from the fraud in any way. It offered to assign any restitution paid by the individuals who defrauded the program to the MDE and the USDA, but asked for an order "relieving it of the obligation to reimburse MDE and/or USDA for any overpayments not covered by such restitution."[39] As of the date of the motion argument, the Department had not sent a Notice of Serious Deficiency to the Respondent or taken steps to terminate the Respondent from participating in the Program.[40]

The federal statute requires state agencies to offer a fair hearing in accordance with USDA regulations to institutions aggrieved by an action of the state as it affects participation in the Program or a claim for reimbursement.[41] The rules require that state agencies offer an administrative review for certain actions, including a demand for the remittance of an overpayment.[42] The MDE selected the contested case procedures set forth in the Administrative Procedure Act, Minn. Stat. Chapter 14, as its administrative review process. Pursuant to 7 C.F.R. § 226.6(k)(5)(x) and appeal procedures adopted

35 *See* Ex. C to Affidavit of Beverly Bryant.

36 Halicki Affidavit, ¶ 9; Mork Affidavit, ¶ 8.

37 Department's Memorandum in Support of Motion at 6, n. 2.

38 *See* Ex. D to Affidavit of Beverly Bryant.

39 *Id*.

40 Mork Affidavit, ¶ 6.

41 42 U.S.C. §1766(e)(1).

42 7 C.F.R. §§ 226.6(k)(2)(xi) and 226.6(k)(4).

by the Minnesota Department of Education, the decision ultimately issued by the Administrative Law Judge will be the final administrative determination in this matter.

Scope and Standard of Review

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[43] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.[44]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[45] To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.[46] A nonmoving party cannot rely on pleadings alone to defeat a summary judgment motion.[47] The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.[48]

When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party,[49] and all doubts and factual inferences must be resolved against the moving party.[50] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[51]

Allegations and Contentions of the Parties

The Department's demand that the Respondent reimburse the overpayment made to the day care providers is based on its interpretation of the Sponsoring Authority agreement, federal regulations, and federal case law arising under the Comprehensive Employment and Training Act of 1973 ("CETA") and other federal grant programs. The Department asserts that, under 7 C.F.R. § 226.14(a), state agencies must disallow any portion of a claim for reimbursement and recover any payment to an institution that was not properly payable under the Program. Because, under 7 C.F.R. § 226.13(a), payments under the Program are to be made "only to sponsoring organizations

43 *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp*., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.

44 *See* Minn. Rules 1400.6600 (2002).

45 *Illinois Farmers Insurance Co. v. Tapemark Co.,* 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

46 *Thiele v. Stitch,* 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal,* 384 N.W.2d 853, 855 (Minn. 1986).

47 *White v. Minnesota Dept. of Natural Resources,* 567 N.W.2d 724 (Minn. App. 1997).

48 *Id*.; *Murphy v. Country House, Inc*., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988).

49 *Ostendorf v. Kenyon,* 347 N.W.2d 834 (Minn. App. 1984).

50 *See, e.g*., *Celotex,* 477 U.S. at 325; *Thompson v. Campbell,* 845 F.Supp. 665, 672 (D.Minn. 1994); *Thiele v. Stich,* 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich,* 185 N.W.2d 876, 878 (Minn. 1971).

51 *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250-251 (1986).

operating under an agreement with the State agency for the meal types specified in the agreement served to enrolled non-resident children and eligible enrolled children of day care home providers, at approved day care homes," the MDE asserts that there simply is no entitlement to reimbursement for meals that were not actually served.

The Department contends that the Respondent, as the sponsoring organization, is jointly liable for the overpayments made to the day care providers and must repay the Department for amounts paid for meals that were not served, regardless of whether fraud was committed by the day care providers without the Respondent's knowledge. In support of this argument, the Department emphasizes that the annual Sponsoring Authority agreements signed by the Respondent acknowledged the Respondent's obligation to comply with Program statutes and regulations. Those regulations include 7 C.F.R. § 226.16(c), which states that "[e]ach sponsoring organization shall accept final financial and administrative responsibility for food service operations in all child care and adult day care facilities under its jurisdiction." The Department draws an analogy to cases under the CETA program[52] which allowed the federal government to recoup overpayments from state agency grantees even though it was sub-grantees who misspent the funds or failed to maintain proper documentation. The Department asserts that these cases apply here because the relationship between the MDE and the Respondent is also governed by a contract between the parties and each subcontractor is liable to the higher tier contractor for administration of the Program.

The Department further argues that the only actions subject to review by the Administrative Law Judge in this proceeding are the Department's demand for recoupment of the overpayment and the Respondent's compliance with the demand, and that the Respondent should not be afforded an opportunity in this proceeding to demonstrate that it falls within the exceptional circumstances noted in the May 25, 2004, FNS Notice. The Department asserts that the only issue before the Administrative Law Judge in this proceeding is whether the Respondent is liable for the overpayment and in what amount, not the further issue of whether the state agency should decide whether to waive all or part of the debt. It contends that the decision whether or not to waive a debt is left to the discretion of the MDE and the Respondent's equitable arguments can be addressed to the Department later, after the issue of liability is addressed in the present proceeding.

The Respondent disagrees that the issues in this matter are limited in the fashion suggested by the Department. The Respondent asserts that, even if the Respondent is found responsible as a matter of law for the overpayments, a hearing is still necessary to determine fact issues relating to the precise amount of the overpayments the Respondent should be required to pay. In this regard, the Respondent emphasizes that the Department's overpayment demand of $264,944.38 exceeds by $30,607.09 the amount the convicted providers were required to pay as restitution in the criminal proceedings ($234,337.29). The Respondent also challenges the basis for the Department's determination of the amount of the overpayment. The Respondent's Director alleged in her affidavit that the Respondent faced significant challenges when it

52 *See, e.g., Atlantic County v. U.S. Dept. of Labor,* 715 F.2d 834, 835-37 (3d Cir. 1983), *GLSF Employment & Training Consortium v. U.S. Dept. of Labor,* 869 F.2d 1490 (6th Cir. 1989), and *Commonwealth of Kentucky v. Donovan,* 704 F.2d 288 (6th Cir. 1983).

sought to verify the existence of all of the children identified on enrollment forms prepared three to six years earlier, due to the lapse of time as well as language and cultural issues, and that it was very difficult to accurately determine which of the children claimed by the convicted providers actually received meals and which did not. The Respondent alleges that the Department ultimately required the Respondent to include in the overpayment all amounts related to children who could not be independently verified, and implicitly challenges the fairness or propriety of that requirement.

The Respondent also contends that the Program regulations recognize that there are some circumstances where it is acceptable for the state agency to relieve sponsoring organizations from the requirement to repay improperly-paid reimbursements. Specifically, the Respondent asserts that 7 C.F.R. 226.14(c) implicitly recognizes that there will be times when a State agency will not collect overpayments by stating that, "[i]f FNS does not concur with the State agency's action in . . . failing to collect an overpayment, FNS shall notify the State agency of its intention to assert a claim against the State agency." In addition, the Respondent argues that it should be afforded an opportunity to make a record at a hearing in this matter that repayment should be excused because the Respondent falls within the exceptional circumstances set forth in the 2004 FNS Notice. The Respondent alleges that it meets the criteria of the FNS Notice because (1) it had no knowledge of the fraud, it followed monitoring procedures that were approved by MDE and were consistent with those used by other Minnesota sponsoring organizations, and it was not responsible for the overpayments to the day care providers, and (2) it has made every reasonable effort to recover the funds by cooperating with the Hennepin County investigators and promptly notifying the MDE when it learned that charges would be filed. The Respondent points out that the MDE was also unable to uncover the fraudulent scheme when it conducted its own review.[53]

Analysis

After careful consideration of the Program statute and rules, the Sponsoring Authority agreement, the 2004 FNS Notice, and relevant case law, the Administrative Law Judge concludes that genuine issues of material fact remain for hearing with respect to the amount of the overpayment for which the Respondent should be held responsible. For that reason, neither party is entitled to judgment as a matter of law, and the parties' cross motions for summary disposition must be denied.

Although the mere fact that the restitution ordered in the criminal proceedings against the day care providers was lower than the amount demanded by the Department is not sufficient in itself to create a genuine issue of material fact with respect to the accuracy of the amount of the Department's repayment demand, other issues raised by the Respondent concerning the amount of the overpayment demand

53 The Respondent also asserted that the MDE's failure to serve the Respondent with a Notice of Serious Deficiency or terminate the Respondent from participation in the Program suggests that the MDE must have concluded that the provider fraud was not the result of the Respondent violating any Program regulations or standards, such as failing to operate in conformance with the performance standards set forth in 7 C.F.R. 226.6(b)(18), claiming reimbursement for meals not served, or failing to properly train or monitor sponsored facilities in accordance with section 226.16(d). It maintains that the MDE is required to issue a Notice of Serious Deficiency if it finds that a Sponsoring Authority has committed these or any of the other serious infractions identified in section 226.6(c)(3)(ii) of the regulations. The Department pointed out that the Program regulations do not set forth a deadline for the issuance of a Notice of Serious Deficiency, and the Department may yet issue such a notice.

do support the conclusion that there are genuine issues of material fact that must be resolved in this matter. For example, the Respondent, through the affidavit of its Director, questioned the propriety of the Department's calculation of the overpayment amount and raised questions about the fairness of the Department's insistence that the overpayment amount include all charges related to children who could not be independently verified three to six years after the charges were incurred.

Furthermore, the Respondent demonstrated that there are fact issues regarding whether its situation falls within the exceptional circumstances described in the 2004 FNS Notice so as to warrant the conclusion that it should not be held responsible for the overpayment. As noted above, the MDE's Sponsoring Authority agreement with the Respondent specifies in Clause 9 that "[t]he Sponsoring Authority . . . will comply with the program statutes and program regulations applicable to the programs covered by this agreement. The Sponsoring Authority also will comply with any [MDE] policy memorandums *and other written directions interpreting the program statutes and regulations*."[54] The latter language would appear to encompass the 2004 FNS Notice issued to sponsoring authorities acknowledging that, in exceptional cases, sponsoring organizations who demonstrate that they are not responsible for an overpayment made to a day care provider and that they have made every reasonable effort to recover the funds will not be held responsible for overpayments. The content of the 2004 FNS Notice, and the inclusion of criteria to guide the decision whether a sponsoring organization should be held responsible for overpayment to a day care provider, suggests that, at least in some circumstances, sponsoring organizations are not automatically to be held jointly liable for overpayments made to day care providers.[55] The 2004 FNS Notice expressly permits consideration of the organization's responsibility for an overpayment and its efforts to recover the funds. Thus, unlike the situation in some of the cases cited by the Department, it is evident here that sponsoring organizations are not always held strictly liable for overpayments made to day care providers but can avoid repayment by showing that certain circumstances were present.[56]

Under the USDA rules, the determination made by the Administrative Law Judge, who is serving as the administrative review official in this matter, is the final administrative determination to be afforded the Respondent.[57] As a matter of due

54 Ex. B to Bryant Affidavit.

55 *See also* 42 U.S.C. § 1766(f)(1)(B) "[t]he State may recover funds disbursed [to eligible institutions] if the State determines that the institution has engaged in fraud or abuse with respect to the program or has submitted an invalid claim for reimbursement") (emphasis added), and 7 C.F.R. 226.14(c) ("[i]f FNS does not concur with the State agency's action . . . in failing to collect an overpayment . . . .")

56 For example, in *Bennett v. New Jersey,* 470 U.S. 632 (1985), and *Bennett v. Kentucky Dept. of Education,* 470 U.S. 656 (1985), the Supreme Court noted that there was no indication in the statute at issue (Title I of the Elementary and Secondary Education Act of 1965) that grantees could avoid repayment by showing that they acted in good faith. In contrast, the Ninth Circuit in *Chicano Education & Manpower Services v. U.S. Dept of Labor,* 909 F.2d 1320 (9th Cir. 1990), mentioned that the facts found by an Administrative Law Judge supported a waiver of a repayment obligation by the Secretary of Labor in a CETA case, and remanded the matter to the Secretary for a consideration of whether special circumstances justified a discretionary waiver of a CETA overpayment.

57 *McKenzie v. Minnesota Office of the State Auditor*, OAH Docket No. 7-0700-13245-2 (Feb. 7, 2001), is not inconsistent with this ruling. In the *McKenzie* case, an Administrative Law Judge held a hearing on an alleged overpayment to an employee of the Auditor's Office and thereafter issued Findings of Fact, Conclusions, and Recommendations to the Auditor. Detailed Findings were made tracing the employment and pay history of the employee, the union wage negotiations, and personnel policies relating to recovery of overpayments. The ALJ recommended that the amount of the overpayment be affirmed. He further recommended that the State Auditor, who had authority to make the final decision, "exercise her discretion in deciding whether to continue pursuing the OSA's right to setoff" and that, if the OSA proceeded to set off the future earnings of the employee to collect the overpayment, it negotiate with the employee in good faith

process, the Respondent should be afforded an opportunity to develop a record in this proceeding regarding whether it meets the criteria set forth in the 2004 FNS Notice.

Accordingly, the parties' cross motions for summary disposition are denied, and this matter shall proceed to hearing. A conference call has been scheduled for Wednesday, December 28, 2005, at 2:30 p.m. to set a hearing date. Counsel should inform the Administrative Law Judge as soon as possible if that date or time is inconvenient.

B.L.N.

to determine a setoff plan that would not cause undue hardship to the employee. The Memorandum in *McKenzie* noted that there was no basis for a determination that recovery of the overpayment was barred as a matter of law or that the employee was entitled to relief. In contrast, the Administrative Law Judge in the case at bar will be rendering the final administrative determination on the overpayment issue, not a recommendation to the agency head. In addition, because the 2004 FNS Notice does recognize an exception to the usual situation in which overpayment is required, the Respondent should be permitted to develop a factual record concerning whether it falls within that exception.